ECORD
AND
RIEFS

No. 15-1262

Supreme Court, U.S.
FILED
OCT 12 2016
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PATRICK MCCRORY, Governor of North Carolina, NORTH CAROLINA STATE BOARD OF ELECTIONS, AND A. GRANT WHITNEY, JR., Chairman of the North Carolina Board of Elections,

Appellants,

v.

DAVID HARRIS & CHRISTINE BOWSER,

Appellees.

On Appeal from the United States District Court for the Middle District of North Carolina

---

BRIEF FOR APPELLEES

KEVIN J. HAMILTON
WILLIAM B. STAFFORD
ABHA KHANNA
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

MARC E. ELIAS
Counsel of Record
JOHN M. DEVANEY
BRUCE V. SPIVA
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

EDWIN M. SPEAS, JR.
CAROLINE P. MACKIE
POYNER SPRUILL LLP
301 Fayetteville Street
Suite 1900
Raleigh, NC 27601
(919) 783-6400
Counsel for Appellees David Harris & Christine Bowser

October 12, 2016

WILSON-EPES PRINTING CO., INC - (202) 789-0096 - WASHINGTON, D.C. 20002

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATEMENT	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
I. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD1	7
A. Direct Evidence Demonstrates that Race Predominated in CD1	7
B. Circumstantial Evidence Demonstrates that Race Predominated in CD1	12
II. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD12	18
A. Direct Evidence Demonstrates that Race Predominated in CD12	18
B. Circumstantial Evidence Demonstrates that Race Predominated in CD12	22
C. Political Considerations Were Subordinated to Race	25
D. An Alternative Plan Is Unnecessary Where Other Evidence Establishes Racial Predominance	31
III. CD1 AND CD12 CANNOT SURVIVE STRICT SCRUTINY	36

TABLE OF CONTENTS—Continued

Page

A. Appellants Concede CD12 Fails Strict Scrutiny 36

B. The General Assembly Had No Strong Basis in Evidence to Support the Race-Based Redistricting of CD1 36

C. *Strickland* Does Not Inoculate the Race-Based Redistricting of CD1 47

IV. APPELLEES' CLAIMS ARE NOT BARRED 50

CONCLUSION 56

TABLE OF AUTHORITIES

CASES Page(s)

Ala. Leg. Black Caucus v. Alabama,
135 S. Ct. 1257 (2015) ..... *passim*

Anderson v. City of Bessemer City,
470 U.S. 564 (1985) 19, 25

Bartlett v. Strickland,
556 U.S. 1 (2009) ..... *passim*

Black Political Task Force v. Galvin,
300 F. Supp. 2d 291 (D. Mass. 2004) 45

Bush v. Vera,
517 U.S. 952 (1996) ..... *passim*

Cano v. Davis,
211 F. Supp. 2d 1208 (C.D. Cal. 2002),
aff'd, 537 U.S. 1100 (2003) 39

Coors Brewing Co. v. Mendez-Torres,
562 F.3d 3 (1st Cir. 2009) 53

Covington v. North Carolina,
No. 1:15-cv-399, 2016 WL 4257351
(M.D.N.C. Aug. 11, 2016) ..... *passim*

Cromartie v. Hunt,
133 F. Supp. 2d 407 (E.D.N.C. 2000),
rev'd, 532 U.S. 234 (2001) 32

Easley v. Cromartie,
532 U.S. 234 (2001) ..... *passim*

Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,
544 U.S. 280 (2005) 54

Griffin v. Burns,
570 F.2d 1065 (1st Cir. 1978) 53

TABLE OF AUTHORITIES—Continued

Page(s)

Growe v. Emison,
507 U.S. 25 (1993) 37

Hansberry v. Lee,
311 U.S. 32 (1940) 54

Hoffman v. Sec'y of State of Me.,
574 F. Supp. 2d 179 (D. Me. 2008) 53

Hunt v. Cromartie,
526 U.S. 541 (1990) 28, 31, 32

Johnson v. De Grandy,
512 U.S. 997 (1994) 37

Levin v. Commerce Energy, Inc.,
560 U.S. 413 (2010) 53

Lewis v. Alamance Cty.,
99 F.3d 600 (4th Cir.1996) 46

McClellan v. Carland,
217 U.S. 268 (1910) 54

Miller v. Johnson,
515 U.S. 900 (1995) ..... *passim*

N. C. State Conference of NAACP v. McCrory,
No. 16-1468, 2016 WL 4053033
(4th Cir. July 29, 2016) 34, 35

NAACP v. Fordice,
105 F.3d 655 (5th Cir. 1996) 52, 53

New Orleans Pub. Serv., Inc. v. Council of New Orleans,
491 U.S. 350 (1989) 55

TABLE OF AUTHORITIES—Continued

Page(s)

Ortiz v. Jordan,
562 U.S. 180 (2011) 51

Page v. Bartels,
144 F. Supp. 2d 346 (D.N.J. 2001) 39

Pérez-Guzmán v. Gracia,
346 F.3d 229 (1st Cir. 2003) 53

Quilter v. Voinovich,
981 F. Supp. 1032 (N.D. Ohio 1997),
aff'd, 523 U.S. 1043 (1998) 46

Quilter v. Voinovich,
No. 5:91-CV-2219, 1992 WL 677145
(N.D. Ohio Mar. 19, 1992) 39

Richards v. Jefferson Cty.,
517 U.S. 793 (1996) 54

Rodriguez v. Pataki,
308 F. Supp. 2d 346 (S.D.N.Y.), *aff'd* 543
U.S. 997 (2004) 39, 40

Shaw v. Reno,
509 U.S. 630 (1993) ..... *passim*

Shaw v. Hunt,
517 U.S. 899 (1996) ..... *passim*

Shaw v. Hunt,
861 F. Supp. 408 (E.D.N.C. 1994) 4

Shelby Cty., Ala. v. Holder,
133 S. Ct. 2612 (2013) 30

Smith v. Bayer Corp.,
564 U.S. 299 (2011) 52, 54

TABLE OF AUTHORITIES—Continued

Page(s)

Sprint Commc'ns, Inc. v. Jacobs,
134 S. Ct. 584 (2013) 54

Taylor v. Sturgell,
553 U.S. 880 (2008) 52, 54

Thornburg v. Gingles,
478 U.S. 30 (1986) ..... *passim*

Uno v. City of Holyoke,
72 F.3d 973 (1st Cir. 1995) 45

Valladolid v. City of Nat'l City,
976 F.2d 1293 (9th Cir. 1992) 45

Westwego Citizens for Better Gov't v. City of Westwego,
872 F.2d 1201 (5th Cir. 1989) 45-46

Williams v. Taylor,
529 U.S. 362 (2000) 55

CONSTITUTION

U.S. Const. amend XIV 2, 3

STATUTES

Voting Rights Act of 1965, 42 U.S.C. § 1973c *et seq* ..... *passim*

RULES

Fed. R. Civ. P. 52(a) 25

ER 801(d)(2) 18

TABLE OF AUTHORITIES—Continued

COURT FILINGS Page(s)

Motion to Affirm or Dismiss, *Harris v. McCrory*, No. 16-166, 2016 WL 4709487 (U.S. Sept. 6, 2016) 31, 34

Br. Opposing Appellees' Motion to Dismiss or Affirm, *Harris v. McCrory*, No. 16-166 (U.S. Sept. 19, 2016) 34

OTHER AUTHORITIES

H.R. Conf. Rep. No. 104–518 (1996) 55

STATEMENT

This case presents, as the district court appropriately put it, a "textbook" example of racial gerrymandering. *See* Jurisdictional Statement Appendix ("J.S. App.") 20a. This is no surprise: The State of North Carolina wrote the book on racial gerrymandering, and its efforts to string together disparate black communities from far-flung parts of the state in Congressional District 1 ("CD1") and Congressional District 12 ("CD12") contravene both the first and latest chapters of the Court's racial gerrymandering jurisprudence.

In *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), and *Shaw v. Hunt*, 517 U.S. 899 (1996) ("*Shaw II*"), the Court analyzed and struck down a predecessor version of CD12 as a racial gerrymander, rejecting the State's contention that drawing a bizarre, noncompact district so as to maximize its black voter population was "a remedy narrowly tailored to the State's professed interest in avoiding" liability under the Voting Rights Act ("VRA"). *Shaw II*, 517 U.S. at 911. The teaching of those cases appears to have been lost on the State.

For decades since the *Shaw* cases, African-American voters in CDs 1 and 12 were able to elect their candidates of choice, "[d]espite the fact that African-Americans did not make up a majority of the voting-age population in these earlier versions of CD 1 or CD 12." *See* J.S. App. 8a. In CD1, the African-American candidate of choice won each and every election by a landslide, never winning less than 59% of the vote. *Id.* 8a-9a. In CD12, meanwhile, the African-American candidate of choice won every election between 1992 and 1998 with no less than 56% of the vote—and no less than 64% in every election held between 2000-2012. Joint Appendix ("JA") 367-79, 2369.

Unsurprisingly, given this history of unalloyed success by African-American-preferred candidates, no lawsuit was brought under the VRA challenging these districts. *See* Appellants' Br. ("Br.") 8 (citing J.S. App. 9).

In redrawing the congressional map in 2011, however, the North Carolina General Assembly ignored the actual electoral history of these districts. Rather, premised on a fundamental misconstruction of Section 2 of the VRA as described in *Bartlett v. Strickland*, 556 U.S. 1 (2009), and on the Department of Justice's ("DOJ") *1992* objection under Section 5 of the VRA (which gave rise to the *Shaw* cases), *see* J.S. App. 32a, the State set out to draw two new majority-minority districts in the apparent belief that doing so would inoculate the State from liability under the VRA. *See* J.S. App. 20a. As a result, the General Assembly markedly increased the black voting age population ("BVAP") of the districts. In CD1, the BVAP was raised from 47.76% to 52.65%. *Id.* 13a. The BVAP of CD12 was ramped up even more dramatically—from 43.77% to 50.66%. *See id.* The result is unsurprising—because the State purposefully packed African Americans into these districts, African-American candidates of choice won with even larger margins of victory. In 2012, for example, African-American candidates of choice won with 75% and 80% of the vote in CDs 1 and 12, respectively.

But contrary to the State's understanding, the VRA is designed to ameliorate and dissipate racial balkanization, not perpetuate it. *See Miller v. Johnson*, 515 U.S. 900, 927-28 (1995) ("It takes a shortsighted and unauthorized view of the [VRA] to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment

forbids."). The State compounded its error, moreover, by seeking to comply with the VRA by sorting hundreds of thousands of voters on the basis of their race to meet a numerical racial threshold unfounded in any "strong basis in evidence." *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015) (citation omitted); *compare* J.S. App. 52a-53a *with Alabama*, 135 S. Ct. at 1271, 1273 (finding "strong, perhaps overwhelming, evidence that race did predominate" where a legislature "relied heavily upon a mechanically numerical view" of the VRA).

On October 24, 2013, North Carolina voters filed this action, challenging the constitutionality of CDs 1 and 12 as racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. Compl. ¶ 1. The case went to trial in October 2015. On February 5, 2016, the three-judge panel (the "Panel") issued a majority opinion finding that CDs 1 and 12 were unconstitutional racial gerrymanders. J.S. App. 56a.

Here, Appellants disagree with the way that the Panel weighed the record evidence, the inferences it drew, and its resolution of disputed facts, including its credibility determinations. But the Panel's findings were far from "clearly erroneous." *Miller*, 515 U.S. at 917. The Panel had ample evidence to support its conclusions—including direct admissions of race-based intent by the plan's legislative architects and the mapdrawer, corroborating testimony by the incumbent representatives of CDs 1 and 12, and circumstantial evidence of the type relied on by this Court time and again. The Panel's careful and thoughtful opinion is firmly rooted in this Court's racial gerrymandering jurisprudence and well-

supported by the factual record. The Court should affirm.

SUMMARY OF ARGUMENT

The standard for a racial gerrymandering claim is well established. Plaintiffs must prove race was the "predominant factor" motivating the districting decision in question. *Miller*, 515 U.S. at 916. The burden then shifts to defendants to satisfy strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 976 (1996). On appeal, the Court reviews the district court's factual findings only to determine if they are "clearly erroneous." *Miller*, 515 U.S. at 917. Here, there is no basis in law or fact to disturb the Panel's thorough and well-reasoned decision.

The direct and circumstantial evidence of racial predominance in CD1 was overwhelming. The plan's architects, Senator Bob Rucho and Representative David Lewis, repeatedly confirmed that they had drawn CD1 as a "VRA district" because they believed, mistakenly, that *Strickland* requires states to draw majority-minority districts whenever possible. They instructed the mapdrawer, Dr. Thomas Hofeller, accordingly. Moreover, both the plan architects and the mapdrawer himself confirmed that traditional districting principles were cast aside whenever they got in the way of the overriding goal of drawing CD1 as a majority-BVAP district.

The result is a behemoth sprawling from the rural Coastal Plain to the City of Durham, extending tendrils to sweep in pockets of African-American voters. What used to be a "distinctively rural" district, *Shaw v. Hunt*, 861 F. Supp. 408, 469 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899 (1996), now includes a significant urban population. CD1 houses only five whole

counties, with the other 19 split between CD1 and one or more other districts, and further splits 21 cities or towns. And these splits occur along racial lines, which the plan architects and mapdrawer confirm was done purposefully. In short, as the Panel found, this is a "textbook" case of racial predominance, where the State included and excluded population from the district based on race, and the district's racial purpose manifested obviously in the way the district lines were drawn.

The direct and circumstantial evidence as to CD12 is similarly compelling. The General Assembly drastically increased the BVAP of the district from 43.77% to just over 50%. This was not happenstance. As the incumbent congressman testified at trial, he was informed by one of the plan architects that the General Assembly was ramping up the BVAP in CD12 to more than 50% because it believed the VRA compelled that result. Consistent with that testimony, the plan architects instructed the mapdrawer to include portions of Guilford County in CD12 because it was, at the time, covered by Section 5 of the VRA. The State then announced in its preclearance submission that it had drawn CD12 as an "African-American . . . district" to comply with the DOJ's 1992 preclearance objection, in which the DOJ had instructed North Carolina to draw a second majority-minority district per its "max black" policy of the time. Notably, Appellants do not even try to explain why it was appropriate for the State to draw districts based on DOJ guidance from more than two decades ago, especially considering that this Court expressly rejected DOJ's "max black" reading of the VRA.

There is no dispute that the result of this process is a district that does not comport with traditional

districting principles. CD12 is one of the most bizarre congressional districts in the country. It is a 120-mile-long, serpentine district that is a mere 20 miles across at its widest part, connecting fragments of Charlotte and Greensboro by a thin strip that traces Interstate 85. A person traveling on Interstate 85 between the two cities would exit the district multiple times. CD12 consists entirely of split counties (six in all) and splits 13 cities and towns.

Appellants claim that political considerations predominated over racial ones in CD12, but the Panel carefully considered the record evidence and found to the contrary. Appellants cannot demonstrate clear error in that conclusion.

The Panel's subsequent determination that both CDs 1 and 12 failed strict scrutiny is similarly well-supported in the record. As to CD12, this is not in dispute. Appellants do not contest that if the Panel's racial predominance finding is affirmed, the district fails strict scrutiny.

As to CD1, the Panel appropriately found that the State lacked a strong basis in evidence for its belief that the VRA compelled it to draw CD1 as majority-BVAP. The State apparently believed that *Strickland* establishes a "safe harbor" that both allows and compels states to draw districts as majority-minority without determining whether doing so is necessary or even advisable under the VRA. Accordingly, the State conducted no analysis of whether the three *Gingles* preconditions were met. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). In particular, the State failed to consider whether there existed a reasonably compact African-American community that would be routinely outvoted by a white majority voting as a bloc. To the contrary, the African-American candidate of choice in

CD1 had won in landslide elections year after year in a district that was not majority-BVAP, and the enacted CD1 is anything but compact.

ARGUMENT

I. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD1

Appellants do not dispute that in constructing the enacted plan, the State placed a large number of voters within or without the boundaries of CD1 because of their race, and that this directly impacted the construction of the district. This is the very definition of racial predominance. *See Miller*, 515 U.S. at 916. Thus, Appellants offer only a terse, conclusory, and half-hearted argument to the contrary. Unable to offer any contrary evidence—let alone evidence establishing clear error—Appellants instead mischaracterize the Panel's decision or ignore outright the bases on which it rested.

A. Direct Evidence Demonstrates that Race Predominated in CD1

In their Jurisdictional Statement, Appellants asserted (without support or citation) that "the North Carolina General Assembly used other criteria besides equal population and race to construct CD1." J.S. 28. In their opening brief, however, they do not argue—let alone adduce evidence—that any factor other than equal population and race even informed the redistricting of CD1. *See* Br. 11-13, 44-47; *see also Alabama*, 135 S. Ct. at 1270 (equal population "is not one factor among others to be weighed against the use of race to determine whether race 'predominates'"). Appellants cannot meet their burden of establishing clear error for this reason alone.

In any event, the Panel's finding of racial predominance in CD1 was amply supported. As the Panel noted, CD1 "presents a textbook example of racial predominance." J.S. App. 20a. The Panel pointed to the "extraordinary amount of *direct* evidence" demonstrating that the General Assembly used a "racial quota" to construct CD1, which then "operated as a filter through which all line-drawing decisions had to pass." *Id.* 20a-21a. Indeed, the Panel found that "[i]t cannot seriously be disputed that the predominant focus of virtually every statement made, instruction given, and action taken in connection with the redistricting effort was to draw CD 1 with a BVAP of 50 percent plus one person." *Id.* 28a.

The mapdrawer, Dr. Hofeller, confirmed that the plan architects, Senator Rucho and Representative Lewis, instructed him to—and he did—draw CD1 as a majority-BVAP district. *See* J.S. App. 23a. Dr. Hofeller was instructed that turning CD1 into a majority-BVAP district was nonnegotiable and that he "had no discretion to go below 50-percent-plus-one-person BVAP." *Id.* 25a (citing JA 2802-03). That is, Dr. Hofeller was instructed that he could take other considerations into account in drawing CD1 only if the "net result" was a majority-BVAP district. *Id.* 24a (citing JA 2802); *see Shaw II*, 517 U.S. at 907 (race predominated where it "was the criterion that, in the State's view, could not be compromised" and other considerations "came into play only after the race-based decision had been made").[1]

---

[1] The statements, instructions and actions of the 2011 congressional plan architects and map drawer mirror their statements, instructions and actions in drawing the 2011 state legislative plans struck down as racial gerrymanders in

The legislative record is "replete with statements" by the plan's architects that CD1 was a "VRA district" that had been drawn purposefully to achieve a predetermined racial target. *See* J.S. App. 21a-22a. The architects stated that CD1 "was drawn with race as a consideration," that CD1 "must include a sufficient number of African-Americans so that [CD1] can re-establish as a majority-black district," and that they consciously "elected to draw the VRA district at 50 percent plus one" BVAP. *Id.* (citations omitted). *Compare Alabama*, 135 S. Ct. at 1271.

Citing the State's purported obligations under the VRA, Senator Rucho and Representative Lewis issued multiple public statements reiterating that race predominated in the construction of CD1. *See* J.S. App. 22a-23a. For example, the statement accompanying the release of the 2011 Congressional Plan stated:

> [T]he State is now obligated to draw majority black districts with true majority black voting age population. Under the 2010 Census, the current version of the First District does not contain a majority black voting age population.
>
> . . . .
>
> Because African-Americans represent a high percentage of the population added to the First District . . . we have . . . been able to re-establish Congressman Butterfield's district as a true majority black district.

JA 355-56; *see also* JA 474.

Covington v. North Carolina, No. 1:15-cv-399, 2016 WL 4257351, at *7-10 (M.D.N.C. Aug. 11, 2016).

Appellants do not dispute any of this evidence. Indeed they "readily admit" it. Br. 46-47. Rather, Appellants argue that the Panel found that race predominated based on the "bare fact" that the State consciously constructed CD1 as a majority-minority district. *Id.* at 44. Neither the opinion nor the record below supports that baseless assertion.

As an initial matter, the fact that a state consciously sets out to ensure that a district has a particular racial composition is "the kind[] of direct evidence [the Court has] found significant in other redistricting cases." *Easley v. Cromartie* ("*Cromartie II*"), 532 U.S. 234, 254 (2001).[2] A state cannot simply invoke the VRA as an automatic means of refuting racial predominance. Indeed, the Court has repeatedly upheld findings of racial predominance where race-based districting decisions were made in purported service of the VRA. *See, e.g.*, *Shaw II*, 517 U.S. at 904-05 (strict scrutiny applies "whether or not the reason for the racial classification is benign or the purpose remedial"); *Vera*, 517 U.S. at 957 (same, where districts were drawn "with a view to complying with the [VRA]"); *Miller*, 515 U.S. at 907 (same, where goal was to gain Section 5 preclearance); *Shaw I*, 509 U.S. at 655 (no "*carte blanche* to engage in racial gerrymandering in the name of" VRA compliance).

---

[2] *See id.* (citing *Vera*, 517 U.S. at 959 "(State conceded that one of its goals was to create a majority-minority district)"; *Miller*, 515 U.S. at 907 "(State set out to create majority-minority district)"; *Shaw II*, 517 U.S. at 906 "(recounting testimony by Cohen that creating a majority-minority district was the 'principal reason' for the 1992 version of District 12)"); *Alabama*, 135 S. Ct. at 1267, 1271-73 (finding "strong, perhaps overwhelming" evidence of racial predominance where a legislature "prioritiz[ed] [a] mechanical racial target[] above all other districting criteria").

More importantly, the State's overriding purpose of creating CD1 as a majority-minority district was no abstraction. Appellants' claim that there was no evidence of "a single line-drawing decision on which that purported 'filter' had any impact, let alone a 'direct and significant' one," Br. 46, is pure sophistry. The Panel, in fact, found that "Dr. Hofeller intentionally included high concentrations of African-American voters in CD1 and excluded less heavily African-American areas from the district." J.S. App. 24a. The record provides no shortage of supporting examples. In drawing CD1, the mapdrawer knew the "net result had to be 50 percent," JA 2802, so he carefully combed through 19 counties, selecting voters along the way on the basis of race. For instance, when asked whether he moved into CD1 "the heavily African-American part" of Durham County, he responded simply, "Well, it had to be." JA 2818.[3]

Appellants also argue that the Panel made no finding that the challenged district lines "departed from traditional principles." Br. 46. That is simply wrong. In fact, the Panel explicitly found that "[i]n order to achieve the goal of drawing CD 1 as a majority-BVAP district, Dr. Hofeller not only subordinated traditional race-neutral principles but

---

[3] *See also* JA 2742 ("With the exception of Greene County, the percentage of the African-American population outside [CD1] was lower than the percentage inside the district, which is exactly what you would think would be the case since the district we're talking about is an African-American majority district."); JA 2736 ("[I]f you build a minority district in a group of counties and . . . only part of some of the counties are in the minority district, . . . it's completely logical that the portions . . . of the counties that are in the minority district, which in this case would be District 1, would have a much higher number of minority residents . . . in them than the portion outside the district.").

disregarded certain principles such as respect for political subdivisions and compactness." J.S. App. 26a-27a.

To be clear, this was not an inference the Panel had to draw—the mapdrawer and the plan architects outright conceded that traditional redistricting criteria were subordinated to the singular pursuit of drawing CD1 as a majority-BVAP district. *See id.* Dr. Hofeller candidly acknowledged that "it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of [CD1]" because "the more important thing was to . . . follow the instructions that [he had] been given by the two chairmen" to draw the district as majority BVAP. JA 2807. Thus, "Hofeller testified that he would split counties and precincts when necessary to achieve a 50-percent-plus-one-person BVAP in CD1," and Senator Rucho and Representative Lewis acknowledged that "[m]ost of our precinct divisions were prompted by the creation of . . . [the] majority-black First Congressional District." *See* J.S. App. 26a-27a (citations omitted). Remarkably, none of this evidence makes an appearance in Appellants' brief.

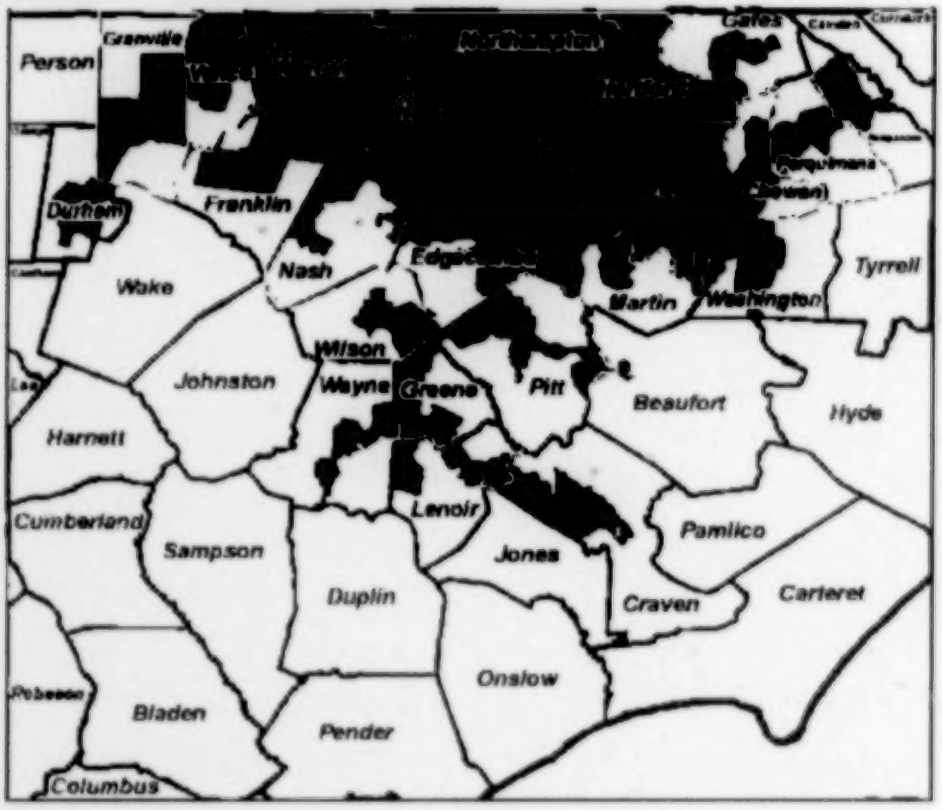
In short, the direct evidence reveals that North Carolina's myopic pursuit of establishing CD1 as a majority-minority district led it to disregard traditional districting principles and to place a substantial number of voters within and without the district because of the color of their skin.

B. Circumstantial Evidence Demonstrates that Race Predominated in CD1

The tale told by the direct evidence is borne out by the circumstantial evidence. The General Assembly's

overriding racial goals had a direct and significant impact on the configuration of CD1.

The Court has recognized that redistricting "is one area in which appearances do matter." *Shaw I*, 509 U.S. at 647. Appellants' suggestion that CD1 is anything other than "extremely irregular" on its face, Br. 45 (citation omitted), is based on chutzpah, not reality. Given the demographics of northeastern North Carolina, Dr. Hofeller needed to hunt far and wide to find a sufficient number of African-American voters to add to CD1. The appearance of CD1 manifests its singular racial purpose.



Dr. Hofeller did not consider measures of compactness in drawing CD1 and, in fact, substantially reduced the district's compactness. J.S. App. 27a. That sacrifice of traditional districting principles is plain on the face of the district. CD1 is grossly non-compact because compactness was subordinated to the

State's overriding racial goals, which required Dr. Hofeller to draw a district which multiple grasping tendrils to capture disparate pockets of black voters. *See infra* tbl.1.

Likewise, CD1 runs roughshod across county lines because Dr. Hofeller split counties whenever necessary to achieve a BVAP majority in CD1. *See* JA 2809. The result is that CD1 was constructed from five whole counties and pieces of an additional 19 counties. CD1 also splits a total of 21 cities and towns. *See* JA 1105-06 ¶¶ 45, 47. By contrast, the benchmark version of CD1 split only 10 counties and 16 cities and towns. *Id.*

The data bear out Dr. Hofeller's admission that he assigned citizens to CD1 or surrounding districts on the basis of race. In the five whole counties, the BVAP exceeds 50%. JA 493-98; JA 385 ¶ (1)(a)(xviii). These counties are adjacent and form the geographic core of the district but contain a mere 21% percent of CD1's total BVAP. JA 493-98. Meanwhile, consistent with Dr. Hofeller's testimony, *supra* 11 & n.3, in the pieces of 19 split counties that are included in CD1, the portions of the counties contained in CD1 are systematically higher than those designated to surrounding districts. JA 493-98; JA 385 ¶ (1)(a)(xviii). The evidence of racial sorting is stark and compelling:

Table 1

County	BVAP in part of county in CD 1	BVAP in part of county in other District(s)	BVAP difference between CD1 and other District(s)
Beaufort	52.19%	20.56%	31.63%
Chowan	44.72%	15.04%	29.68%
Craven	41.03%	16.03%	25.00%
Durham	49.02%	(CD 4) 22.48%	26.54%
		(CD 6) 16.81%	32.21%
		(CD 13) 9.59%	39.43%
Edgecombe	68.20%	30.51%	37.69%
Franklin	44.68%	19.16%	25.52%
Gates	49.95%	27.23%	22.72%
Granville	41.04%	(CD 6) 34.59%	6.45%
		(CD 13) 19.53%	21.51%
Greene	36.12%	38.91%	-2.79%
Lenoir	62.78%	(CD 3) 35.02%	27.76%
		(CD 7) 17.08%	45.70%

Table 1			
County	**BVAP in part of county in CD 1**	**BVAP in part of county in other District(s)**	**BVAP difference between CD1 and other District(s)**
Martin	**54.01%**	**20.31%**	**33.70%**
Nash	54.26%	23.54%	30.72%
Pasquotank	**51.17%**	**19.03%**	**32.14%**
Perquimans	35.38%	15.75%	19.63%
Pitt	**56.45%**	**22.72%**	**33.73%**
Vance	53.73%	35.45%	18.28%
Washington	**59.50%**	**27.11%**	**32.39%**
Wayne	49.71%	18.46%	31.25%
Wilson	**65.03%**	**23.78%**	**41.25%**

JA 493-98; JA 385 ¶ (1)(a)(xviii); *see also generally* JA 313-21 (analyzing pattern of racial sorting in CD1).

Similarly, when it was necessary for Dr. Hofeller to split precincts to achieve a BVAP majority in CD1, he did so. *See* JA 2809. The plan architects announced that most "precinct divisions were prompted by the creation of Congressman Butterfield's majority-black First Congressional District." JA 360. It is thus not surprising that no fewer than 35 precincts were split along racial lines with far more black voters assigned to CD1 than to the adjoining districts. JA 493-98. For instance, the boundary between CD1 and CD3 in Pasquotank, Pitt, and Wilson Counties is formed

almost entirely by split precincts that fall along racial lines. JA 496-98; JA 385 ¶ (1)(a)(xviii).

In sum, the Panel based its predominance finding on the same kind of evidence the Court found to be "strong, perhaps overwhelming, evidence that race did predominate" in drawing an Alabama senate district. *Alabama*, 135 S. Ct. at 1271. As in *Alabama*, (1) the mapdrawer understood that the primary redistricting goal was to achieve a precise racial percentage in CD1, *compare id. with* J.S. App. 21a-23a; (2) CD1 became significantly less compact, *compare Alabama*, 135 S. Ct. at 1271, *with* J.S. App. 27a; (3) black voters were disproportionately added to CD1 while white voters were disproportionately excluded, *compare Alabama*, 135 S. Ct. at 1271, *with* J.S. App. 24a; (4) counties, cities, towns, and precincts were split along racial lines, *compare Alabama*, 135 S. Ct. at 1271, *with* J.S. App. 26a-27a; and (5) the mapdrawer achieved his professed racial target, *compare Alabama*, 135 S. Ct. at 1271, *with* J.S. App. 23a. Appellants' gross over-simplification of the basis of the Panel's decision is belied by the Panel's extensive, undisputed factual findings.

Like the original *Shaw* district, CD1 "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin." *Shaw I*, 509 U.S. at 647. Like the original *Shaw* district, CD1 "bears an uncomfortable resemblance to political apartheid." *Id.*

II. THE DISTRICT COURT PROPERLY FOUND THAT RACE PREDOMINATED IN CD12

The Panel's factual determination that race predominated in CD12 is also well supported by the evidence. *See* J.S. App. 30a-44a.

A. Direct Evidence Demonstrates that Race Predominated in CD12

The BVAP in CD12 was ratcheted up from 43.77% under the 2001 Congressional Plan to 50.66% under the 2011 Congressional Plan—an increase of nearly seven percentage points. JA 479. As with CD1, the Panel drew on ample direct evidence that this dramatic increase in BVAP (to just over 50%) was not mere happenstance (as Appellants argue) and, in fact, was the predominant purpose behind CD12.

Mel Watt, who represented CD12 in 2011, testified at trial that Senator Rucho told him that he "had to ramp the minority percentage in my Congressional District up to over 50 percent [black] to comply with the Voting Rights Law." JA 2368-69. The Panel, "[b]ased on its ability to observe firsthand Congressman Watt . . . credit[ed] his testimony and [found] that Senator Rucho did indeed explain to Congressman Watt that the legislature's goal was to 'ramp up' CD 12's BVAP." J.S. App. 34a-35a.[4]

---

[4] Perhaps cognizant that this race-based goal lacked justification, Senator Rucho "was not very comfortable" knowing that he had "to go out and justify that [redistricting goal] to the African-American community." JA 2369. Congressman Watt responded by stating, "If you ramp my Congressional District African-American percentage up to over 50 percent, I'll probably get 80 percent of the vote, and – and that's not what the Voting Rights Act was designed to do." *Id.*

Appellants argue that this testimony has "little probative value" because Senator Rucho denied making the statement. Br. 41.[5] But gauging witness credibility is a classic prerogative of the trial court and "can virtually never be clear error." *Anderson v. City of Bessemer City,* 470 U.S. 564, 575 (1985). This rule is particularly applicable here, where Appellants chose not to call Senator Rucho to testify, despite the fact that he was listed as a witness and present at trial. J.S. App. 34a.

Appellants also argue that even if Senator Rucho did tell Representative Watt that he was going to ramp up CD12's BVAP above 50%, the testimony is irrelevant because Congressman Watt "convinced Senator Rucho that no such ameliorative action was necessary." Br. 41-42. This is a puzzling argument, given what Senator Rucho did next.

That is, consistent with Congressman Watt's testimony, Senator Rucho and Representative Lewis promptly unveiled a plan wherein CD12 was drawn at just over 50%, along with a public statement emphasizing the racial purpose behind the district. This statement indicated that "[b]ecause of the presence of Guilford County in the Twelfth District [which was covered by Section 5 of the VRA], we have drawn our proposed Twelfth District at a black voting age level that is above the percentage of black voting age population found in the current Twelfth District. We believe that this measure will ensure preclearance of the plan." JA 358. *Compare Alabama*, 135 S. Ct. at

---

[5] Appellants characterize this statement as "double hearsay," Br. 41, but do not suggest the Panel erred by considering it. For good reason. Appellants did not object to this testimony at trial. JA 2368-69. In any event, it is an admission by a party opponent. *See* ER 801(d)(2).

1271 (finding strong evidence of racial predominance where "[t]he legislators in charge of creating the redistricting plan believed . . . that a primary redistricting goal was to maintain existing racial percentages in each majority-minority district, insofar as feasible").

Appellants dismiss this express admission of race-based redistricting as a mere description of the "*results* of the redistricting, not the motivation behind it." Br. 36. This revisionist history ignores both the plain language of the plan's architects and the express concessions of the plan's mapdrawer. The public statement issued by Senator Rucho and Representative Lewis stated that the BVAP of CD12 was increased "[*b*]*ecause* of the presence of Guilford County," JA 358 (emphasis added), negating Appellants' contention that Section 5 was an afterthought to the redistricting process. Moreover, the plan sponsors *admittedly instructed* the mapdrawer to move black residents of Guilford County into CD12 because of their race. J.S. App. 38a-39a. As the mapdrawer put it, "in order to be cautious and draw a plan that would pass muster under the Voting Rights Act, it was decided to reunite the black community in Guilford County into the Twelfth." JA 558; J.S. App. 38a (noting Dr. Hofeller's testimony that he was "aware of the fact that Guilford County was a Section 5 county" and that he "was instructed [not] to use race in any form *except* perhaps with regard to Guilford County") (quoting JA 2791, 2821). The mapdrawer's admission that he was instructed to use race in constructing CD12 explains why the Panel found the mapdrawer's assertion that he did not consider race in constructing CD12 to ring "hollow." J.S. App. 39a n.8. Again, Appellants simply ignore that inconvenient aspect of the Panel's decision.

This also answers Appellants' attempt to compare this statement to an ambiguous statement from *Cromartie II*, in which a legislator stated that the plan there "overall . . . provides for a fair, geographic, racial and partisan balance throughout the State of North Carolina." *Cromartie II*, 532 U.S. at 253 (citation omitted). This Court found that a generalized statement that race was considered as one factor among many as to the plan as a whole did not demonstrate that a specific challenged district had been drawn using race as the predominant factor. *Id.* Here, by contrast, the plan architects explained that the reason for increasing the BVAP *in this specific district* was the pursuit of preclearance under Section 5, making clear that the General Assembly's (mistaken) attempts at VRA compliance were the driving factor behind both of the new majority-minority districts.

Furthermore, the State's preclearance submission (1) confirms that "'[o]ne of the concerns of the Redistricting Chairs was that in 1992, the Justice Department had objected to the 1991 Congressional Plan because of a failure by the state to create a second majority minority district,'" (2) indicates that the State "drew the new CD 12 based on these considerations," and (3) emphasizes that by increasing the BVAP of CD12 from 43.77% to 50.66%, the enacted plan "'maintains, and in fact increases, the African-American community's ability to elect their candidate of choice in District 12.'" J.S. App. 32a-33a (quoting JA 478-79); *see also* JA 478-79 (stating that the General Assembly drew "District 12 as an African-American . . . district that has continually elected a Democratic African American since 1992" and that CD12 had been drawn to protect "African-American voters in Guilford and Forsyth").

The significance of this submission cannot be overstated. The 1992 DOJ objection drove the enactment of the original *Shaw* district. *Shaw II*, 517 U.S. at 912-13. The State, in other words, expressly stated that it drew CD12 as a majority-minority district to comport with an antiquated DOJ objection premised on the "max-black" policy the Court repudiated in *Miller* and which led it to strike down the last version of CD12 drawn as majority-black in *Shaw II*. *See* J.S. App. 33a (citing *Miller*, 515 U.S. at 921-24). Thus, the State's suggestion that Section 5 of the VRA somehow compelled the redrawing of CD12 as a majority-minority district confirms the State's efforts to reconstruct the original racial gerrymander of CD12.

It is unsurprising that Appellants back away from this telling admission now, claiming (without authority) that the Panel's reliance on the State's explanation of its motivations in its preclearance statement is "contrary to this Court's cases." Br. 37. To the contrary, the Court routinely relies on preclearance submissions in examining racial predominance.[6]

B. Circumstantial Evidence Demonstrates that Race Predominated in CD12

As with CD1, CD12's tortured shape and race-based county splits reinforce the direct evidence of racial predominance.

---

[6] *See Vera*, 517 U.S. at 960 (submission noted "three new congressional districts should be configured in such a way as to allow members of . . . minorities to elect Congressional representatives") (citation and quotation marks omitted); *Shaw II*, 517 U.S. at 906 (submission described legislature's "*overriding* purpose . . . to create two congressional districts with effective black voting majorities") (citation omitted).

The barest glance at CD12 reveals that it cannot be explained by traditional redistricting criteria.

CD12, the least compact district in the State, "is a 'serpentine district [that] has been dubbed the least geographically compact district in the Nation.'" J.S. App. 35a (quoting *Shaw II*, 517 U.S. at 906). In redrawing CD12 in 2011, the State managed to reduce the compactness of CD12 even further. J.S. App. 35a-36a. *Compare Alabama*, 135 S. Ct. at 1271 (describing "change of district's shape from rectangular to irregular" as evidence of racial predominance).

CD12 is constructed from pieces of six counties: Mecklenburg, Cabarrus, Rowan, Davidson, Forsyth, and Guilford. A thin line of precincts running through Cabarrus, Rowan and Davidson counties connects African-American population centers in Mecklenburg (Charlotte), Forsyth (Winston-Salem), and Guilford (Greensboro). CD12 splits 13 cities and towns. JA 312 ¶ 17.

There is no dispute that—just like in CD1, where the State admits it used race to draw the lines—the county divisions in CD12 fall along racial lines:

Table 2

County	BVAP in part of county in CD12	BVAP in part of county in other District(s)	BVAP difference between CD12 and other District(s)
Cabarrus	15.14%	14.71%	.43%
Davidson	18.57%	(CD 8) 5.67%	12.9%
		(CD 5) 5.53%	13.04%
Forsyth	70.58%	18.44%	52.14%
Guilford	58.18%	15.21%	42.97%
Mecklenburg	51.76%	(CD 9) 14.22%	37.54%
		(CD 8) 38.13%	13.63%
Rowan	27.92%	(CD 5) 19.83%	8.09%
		(CD 8) 5.79%	22.13%

JA 499-502; JA 385 ¶ (1)(a)(xviii). In five out of six counties, the BVAP in the portion of the county in CD12 is three to four times greater than the BVAP in the portion of the county in the neighboring district. *Id.*

Thus, CD12's "shape and demographics" fully supports the Panel's conclusion that the General Assembly subordinated traditional districting criteria to racial considerations in crafting CD12. *Miller*, 515 U.S. at 916.

C. Political Considerations Were Subordinated to Race

None of this is in dispute. Appellants do not argue that CD12 was, in fact, drawn to comply with traditional districting principles. Rather, they argue that CD12 was drawn "to maximize political opportunities for the party in power." Br. 24. They advanced the same argument below, and the Panel thoroughly considered and rejected it in light of the record evidence, which showed that Appellants' "politics not race" argument, "was more of a post-hoc rationalization than an initial aim." J.S. App. 40a. This conclusion is well supported by the record evidence set out in the Panel's opinion and is not clearly erroneous.

In arguing otherwise, Appellants rely almost entirely on Dr. Hofeller's testimony. In essence, Appellants complain that the Panel should have found his testimony credible but did not. *See* Br. 28-29. As noted above, the Panel carefully considered this testimony and determined that it was *not* credible. *See* J.S. App. 37a-39a; *see also Anderson*, 470 U.S. at 575 ("When findings are based on determinations regarding the credibility of witnesses, Rule 52(a) demands

even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said."). Specifically, the Panel noted how Dr. Hofeller's deposition testimony (in which he testified that he relied on race in drawing CD12) was inconsistent with his trial testimony (in which he claimed that he did not rely on race in drawing CD12). J.S. App. 38a-39a. The Panel was understandably dubious of Dr. Hofeller's attempt to whitewash his earlier testimony in light of his statements about the alleged importance under Section 5 of reuniting the African-American community of Guilford County in CD12. *Id.* 39a.

Indeed, the inconsistencies between Dr. Hofeller's two expert reports further calls into question this witness's credibility. Dr. Hofeller's first report (dated January 17, 2014) notes that Section 5 not only informed the drawing of CD12 but also *directly contributed* to making it less compact.

> The General Assembly, mindful that Guilford County was covered by Section 5 of the VRA, determined that it was prudent to reunify the African-American community in Guilford County. This could avoid the possibility of a charge of fracturing the community and, inhibiting preclearance by DOJ under Section 5. This extension of the New 12th District further to the northeast into Guilford County caused the circumscribing circle around the district to increase . . . in diameter and lowered the Reock Score.

JA 1103. Dr. Hofeller's second expert report (dated June 4, 2015), however, makes no mention of Section 5, instead echoing the same refrain repeated in

Appellants' Brief. *See* JA 1146 ("To repeat, the GOP policy goal behind the location of the 2011 12th District in Guilford County was to remove as many strong Democrat VTDs from the remainder of the county."). Appellants simply ignore the inconsistencies in Dr. Hofeller's testimony that suggest a post-hoc attempt to bury the racial purpose behind CD12 and that led the Panel to give more weight to other evidence. To be sure, Appellants fail to offer the Court any reason to believe the Panel's credibility determination was clearly erroneous.

The Panel's conclusion was further bolstered by the plan architects' statements trumpeting the way they increased CD12's BVAP in purported service of the VRA, JA 358, while "attempt[ing] to downplay the 'claim[] that [they] have engaged in extreme political gerrymandering'" as "'overblown and inconsistent with the facts.'" J.S. App. 39a (quoting JA 362-63). Appellants airily dismiss this evidence. "Understandably," Appellants suggest, the plan architects misrepresented the true "partisan impact of the new plan in an attempt to garner bipartisan support." Br. 29; *see also id.* at 35 ("[A] public-facing statement made by legislators seeking to quell partisan opposition to their redistricting plan says very little about the legislators' predominant motives in drawing the plan[.]"). In other words, Appellants argue that the Panel committed clear error by accepting the architects' public statement as true rather than presuming they were pulling the wool over the eyes of the electorate. They present no authority supporting the startling and profoundly cynical proposition that

courts should assume that legislators are lying to their constituents when it comes to redistricting.[7]

The Panel's predominance determination was "further supported" by testimony provided by Appellees' experts, who—using different methodologies—offered additional circumstantial evidence that race rather than politics better explained the contours of CD12. J.S. App. 40a. Offering the same arguments that the Panel considered and rejected, *id.* 40a-42a, Appellants complain that the Panel put too much reliance on this expert evidence, even though it had (in their view) "little" probative value. Br. 37.

As an initial matter, the Panel appropriately noted that, while not dispositive, Appellees' expert evidence provided additional "circumstantial support for the conclusion that race predominated." J.S. App. 42a. Appellants' various criticisms of the experts' analyses, meanwhile, miss the mark. Appellees' expert Dr. Peterson concluded, on the strength of a boundary segment analysis, that "race 'better accord[ed] with' the boundary of CD12 than did politics." J.S. App. 40a-41a (citation omitted). This is the same analysis he did in the *Cromartie* cases, which the Court credited even if it found it was not dispositive in and of itself. *Hunt v. Cromartie* ("*Cromartie I*"), 526 U.S. 541, 550 (1999); *Cromartie II*, 532 U.S. at 251-52. Putting aside their efforts at obfuscation, Appellants do not dispute the

---

[7] Indeed, Senator Rucho and Representative Lewis were hardly shy about admitting their brazenly partisan ends and means in drafting the purported "remedy" to the enacted plan. *See* Dkt. 155 at 103 (Rep. Lewis "acknowledge[d] freely that [the new plan] would be a political gerrymander"); *id.* at 205 (Sen. Rucho: "I think electing Republicans is better than electing Democrats. So I drew [the new plan] in a way to help foster what I think is better for the country.").

Panel's description of Dr. Peterson's results, which demonstrated that the racial imbalance was "more pronounced" than the political imbalance, J.S. App. 41a.

Dr. Ansolabehere, meanwhile, used a different methodology to conclude that the changes to CD12 "can be only explained by race and not party." JA 2553; *see also* JA 328-37. Appellants offer one and only one rejoinder to Dr. Ansolabehere's testimony—he examined voter registration figures, which is a "defect" that was "exposed" in *Cromartie II*. Br. 37. But *Cromartie II* did not create a legal rule banning consideration of voter registration figures in all racial gerrymandering cases. Rather, it relied on the available evidence to conclude that, on that record (developed nearly two decades ago), evidence of voting registration was "inadequate" to predict voter preference. *Cromartie II*, 532 U.S. at 245-46 (citing deposition transcripts and appendix). The record evidence in this case is different.

Appellants grossly mischaracterize Dr. Ansolabehere's testimony. His "best explanation" for why he used registration was not that it was "a pretty good indicator of voting behavior." JA 2535. Rather, he explained that he was fully aware of *Cromartie II*, but that after conducting a thorough analysis of *present* conditions, he found that "black registration was actually a much better indicator of voting behavior than the black voting-age population was," and one that allowed a more granular analysis than other available data. *Id.*; *see also* JA 2561 ("I looked at the relationship between the election results and the registration data to confirm that the registration data were indeed predicative of voting behavior" and found "that the [black] registration data from North Carolina, especially around the area of CD1 and CD12,

were much stronger predictors of voting behavior than were black voting-age population."). The Panel credited that conclusion based on the record presented. J.S. App. 41a-42a.

Appellants dismiss Dr. Ansolabehere's conclusions, but offer no evidence or argument that they were inaccurate. That is, they present no evidence that Dr. Ansolabehere's conclusions were erroneous as a factual matter. Rather, they simply suggest that North Carolina courts are forever bound by the factual record on voter registration data as paraphrased by the Court fifteen years ago. This disregards both common sense and law. *Cf. Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2631 (2013) (requiring voting rights legislation to be considered in terms of "current conditions").

To put it mildly, it is hard to square Appellants' contention that voter registration data is irrelevant with their repeated deployment of such data as a predictor of voting behavior whenever it suits them to do so. For instance, in their July 19, 2011 press release, the plan's architects defended against criticism that the map was drawn to advantage Republicans by pointing to the number of registered Democrats across all districts. *See* J.S. App. 42a (citing JA 363). Their outside counsel similarly instructed that "registration advantage is the best aspect to focus on to emphasize competitiveness[, as] [i]t provides the best evidence of pure partisan comparison." *Id.* 40a (quoting JA 259). Likewise, in their briefing below, Appellants touted voter registration figures to defend the General Assembly's remedial plan against the attack that it is a partisan gerrymander. Dkt. 159 at 18. And in their defense of Appellees' cross-appeal, which challenges the remedial plan drawn to replace

the racial gerrymander at issue here, Appellants rely extensively on voter registration figures. Motion to Affirm or Dismiss, *Harris v. McCrory*, No. 16-166, at 17, 26. Appellants' endorsement of registration data when it suits their needs thoroughly undermines their argument that reliance on voter registration data here is reversible error.

In short, Appellants cannot establish that the Panel's factual findings are clear error—nor distort those factual findings as legal error—merely by expressing their disagreement with the inferences fairly drawn by the Panel from the record evidence.

D. An Alternative Plan Is Unnecessary Where Other Evidence Establishes Racial Predominance

Unable to show that the Panel's factual findings are clear error, Appellants next claim that the direct and circumstantial evidence outlined above simply makes no difference. They contend that, regardless of the strength of the evidence on racial predominance, all racial gerrymandering plaintiffs are "required" to proffer circumstantial proof in the form of alternative plans which would have achieved the legislature's purported political objectives. Br. 31. Thus, Appellants assert that an alternative map reflecting a direct conflict between race and politics is a necessary element of a *Shaw* claim.

This grossly misreads *Cromartie*. "The issue in [*Cromartie* was] evidentiary." *Cromartie II*, 532 U.S. at 241. The *Cromartie* cases were the aftermath of the *Shaw* cases. There, the General Assembly had redrawn CD12 to remedy the majority-minority district struck down in *Shaw II*. The General Assembly redrew the district "guided by two avowed

goals: (1) curing the constitutional defects of the 1992 Plan by assuring that race was not the predominant factor in the new plan, and (2) drawing the plan to maintain the existing partisan balance in the State's congressional delegation." *Cromartie v. Hunt*, 133 F. Supp. 2d 407, 413 (E.D.N.C. 2000), *rev'd sub nom. Easley v. Cromartie*, 532 U.S. 234 (2001). Accordingly, the General Assembly drastically reduced the BVAP of CD12– from the majority-minority district struck down in *Shaw II* to a 43% BVAP district. *See Cromartie I*, 526 U.S. at 544. Unsurprisingly, then, the record in *Cromartie* was nearly devoid of evidence that race was considered in drawing the district, and replete with overwhelming evidence that political considerations predominated. *Cromartie II*, 532 U.S. at 242; *see also Cromartie I*, 526 U.S. at 549 (plaintiffs "presented no direct evidence of intent"); Br. 7 ("The evidence that politics predominated over race was so strong that Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, wrote separately to suggest that *the State* may have been entitled to summary judgment.").

Thus, the State took pains to minimize its use of race and emphasize its political goals, and the evidence bore that out. The plaintiffs in *Cromartie* could initially muster "only circumstantial evidence in support of their claim," and that circumstantial evidence "support[ed] both a political and racial hypothesis." *Cromartie I*, 526 U.S. at 547, 550. This Court held, on the largely circumstantial record, that the plaintiffs had "not successfully shown that race, rather than politics, predominantly accounts for" the resulting map. *Cromartie II*, 532 U.S. at 257. In *that kind of case*, where other available evidence did not establish racial predominance, and race and party are highly correlated, the Court noted that a plaintiff

could surmount a claim that politics predominated by showing that the legislature could have achieved its legitimate political objectives "in alternative ways that are comparably consistent with traditional redistricting principles." *Id.* at 258.

Nothing in *Cromartie II* suggests that a court must turn a blind eye to compelling direct and circumstantial evidence of racial predominance for lack of an alternative plan. Were that what the Court intended, the first twenty pages of *Cromartie II*, in which the Court weighs all of the available evidence, would have been an exercise in futility. The Panel did not commit clear error in discharging its duty to evaluate all of the evidence to determine racial predominance rather than dismissing the case outright for lack of an alternative plan.

Indeed, the record here is markedly different. It simply is not true that "this is *Cromartie II* all over again." Br. 23. If anything, this is *Shaw II* all over again, as the General Assembly here reconstructed the *Shaw* district. Whereas in *Cromartie* the General Assembly greatly reduced the BVAP in CD12 to remedy the *Shaw* violation, here it dramatically *increased* the BVAP of CD12 to over 50%. This was consistent with Senator Rucho's explanation to Representative Watt of the race-based motivation behind increasing the BVAP in CD12, the press release citing Section 5 of the VRA as the basis for the BVAP increase, and the State's explanation that it drew CD12 as a majority-minority district to respond to the DOJ's 1992 preclearance objection. In short, as the Panel found, *Cromartie II* bears scant resemblance to the record here, where "at the outset district lines were admittedly drawn to reach a racial quota" and

"political concerns" were then "noted at the end of the process." J.S. App. 43a.[8]

Appellants' reasoning, moreover, would give states *carte blanche* to use race to draw district lines so long as there are concurrent political benefits, thereby vitiating the well-recognized rule that a state cannot use race as a "proxy" for partisan ends. *See Vera*, 517 U.S. at 968 ("[T]o the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation."); *Miller*, 515 U.S. at 920 ("[W]here the state assumes from a group of voters' race that they 'think alike, share the same political interests, and will prefer the same candidates at the polls,' it engages in racial stereotyping at odds with equal protection mandates.") (quoting *Shaw I*, 509 U.S. at 647); *N.C. State Conference of NAACP v. McCrory*, No. 16-1468, 2016 WL 4053033, at *8 (4th Cir. July 29, 2016) ("Using race as a proxy for party may be an effective way to win an election," but intentionally targeting a particular race "because its members vote for a particular party, in a predictable

---

[8] Moreover, Appellants have effectively conceded—in the form of the "remedial" plan Appellees challenge in their cross-appeal—that they can meet their purported goal of "maximiz[ing] political opportunities for the party in power," Br. 24, while better comporting with traditional districting principles. *See* Motion to Affirm or Dismiss, *Harris v. McCrory*, No. 16-166, at 21-22 ("It is beyond dispute . . . that the 2016 Congressional Plan follows traditional redistricting criteria better than any map in North Carolina for at least the past 25 years."). As Appellees have explained, the General Assembly responded to the Panel's Order striking down CDs 1 and 12 by drawing a plan that eliminates the serpentine CD12 while "preserving" the 10-3 "partisan advantage" secured as a result of the racial gerrymander at issue here. *See generally* Brief Opposing Motion to Dismiss or Affirm, *Harris v. McCrory*, No. 16-166.

manner" triggers strict scrutiny, "even absent any evidence of race-based hatred and despite the obvious political dynamics.").

But that is precisely what Appellants' litigation position suggests the State did. Appellants applaud the General Assembly's achievement of its partisan goals. *See* Br. 24 ("[J]udged in political terms, it was a success[.]"); *id.* at 30 (citing favorable election results as evidence of General Assembly's "political motivations"). But this hardly contradicts the overwhelming evidence of racial predominance.[9] It simply indicates that the General Assembly's use of race—as admitted by the plans' architects and mapdrawer and further reflected in the district's shape and demographics and the race versus party analyses performed by Appellees' experts—was in service of its political objectives.

It is not surprising that the General Assembly's purposeful packing of African-American voters into CD12 benefits the legislators who engineered the plan. *See N.C. State Conference of NAACP*, 2016 WL 4053033, at *17 (noting that the North Carolina General Assembly used an elections bill "to entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party"). Where the record evidence, as considered and weighed by the district court, indicates that the General Assembly's partisan goals were achieved predominantly by shuffling voters in and out of a district on the basis of race,

---

[9] Appellants admit, for instance, that the State used race to draw CD1 in purported service of the VRA, Br. 44, and that this was entirely consistent with its partisan aims, *id.* at 10 (noting that Dr. Hofeller was instructed to favor Republican candidates by "concentrating Democratic voting strength in District[] 1").

no alternative plan is required to disentangle the political ends from the racial means.

III. CD1 AND CD12 CANNOT SURVIVE STRICT SCRUTINY

A. Appellants Concede CD12 Fails Strict Scrutiny

The Panel's conclusion that the predominant use of race in CD12 was not narrowly tailored to a compelling government interest is not in dispute. As the Panel noted, Appellants "completely fail[ed] to provide . . . a compelling state interest for the general assembly's use of race in drawing CD 12." J.S. App. 44a-45a. Appellants do not challenge the Panel's strict scrutiny analysis for CD12 on appeal. Thus, if the Panel's factual determination that race predominated in CD12 is not clearly erroneous, Appellants concede the district fails strict scrutiny.

B. The General Assembly Had No Strong Basis in Evidence to Support the Race-Based Redistricting of CD1

The Panel's conclusion that the General Assembly's predominant use of race in CD1 was not narrowly tailored to a compelling government interest is also well supported in the record evidence.

Appellants maintain that CD1 is narrowly tailored to the State's compelling interest in foreclosing a claim under Section 2 of the VRA. In the districting context, no liability under Section 2 of the VRA can inure in the absence of the three "*Gingles*" preconditions: (1) that the minority group in question is "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) that the group "is politically cohesive"; and (3) that a

"white majority votes sufficiently as a bloc" such that it can "usually . . . defeat the minority's preferred candidate." J.S. App. 47a, 50a-51a (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Proof of these three preconditions is necessary but not sufficient to establish Section 2 liability. *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994). A totality of the circumstances test is applied upon proof of the three *Gingles* preconditions, "not only because bloc voting [is] a matter of degree, with a variable legal significance depending on other facts, but also because the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id.* (citation omitted).

The Panel concluded that CD1 failed strict scrutiny because Appellants failed to establish any strong basis in evidence establishing the third *Gingles* factor—that a "white majority was *actually* voting as a bloc to defeat the minority's preferred candidates." J.S. App. 50a-51a.[10] For good reason: "CD1 has been an extraordinarily safe district for African-American preferred candidates of choice for over twenty years." *Id.* 53a. African-American preferred candidates—without fail—"easily and repeatedly" won reelection even though "African Americans did not make up a majority of the voting-age population in CD1." *Id.*

---

[10] The fact that CD1's bizarre shape is predominantly attributable to race indicates that the State failed to establish a strong basis in evidence as to the first *Gingles* factor as well. *See Vera*, 517 U.S. at 979 ("[Section] 2 does not require a State to create, on predominantly racial lines, a district that is not 'reasonably compact.'") (citation omitted).

Nonetheless, the General Assembly ratcheted up the BVAP of CD1 from 47.76% to 52.65%. J.S. App. 53a.[11]

The General Assembly did no analysis to determine whether a 50%-plus-one BVAP threshold was compelled under the VRA. *See* J.S. App. 49a. That is, even though the General Assembly's mapdrawer was a seasoned redistricting expert with significant experience determining whether "minority districts . . . meet the requirements of . . . Section[] 2," JA 1094, neither he nor anyone else in or on behalf of the General Assembly ever analyzed whether a white majority would (or could) usually vote to defeat African-American preferred candidates unless CD1 was drawn as a majority-BVAP district. That is undisputed.[12]

Because an African-American-preferred candidate had won every election easily for years in a district that was not majority BVAP, and given that the State admitted it did not analyze the third *Gingles* factor, Appellants strain so mightily to adduce a "strong basis" in evidence that they mischaracterize the record entirely.

---

[11] Appellants strain to dismiss the ease with which the African-American candidate of choice won elections in the benchmark CD1, noting that he won reelection in 2010 "by the smallest margin of his political career" and "by only 33,000 votes." Br. 58. To be clear, that artful phrasing means that Congressman Butterfield won in a landslide with roughly 60% of the vote, *see* JA 378, and that was the *closest* election ever held in CD1 under the benchmark map.

[12] This is consistent with Dr. Hofeller's approach to drawing the State's legislative "VRA districts." *See Covington*, 2016 WL 4257351, at *47 (Dr. Hofeller "drew the race-based districts without regard to whether African-American candidates of choice were actually elected or defeated").

First, Appellants point to an expert report by Dr. Ray Block, implying that Dr. Block conducted an analysis of the proposed CD1 and found a high degree of racially polarized voting, with "non-blacks consistently vot[ing] against African-American candidates." Br. 53 (quoting JA 956). But Dr. Block's report presents only generalized conclusions regarding the existence of racially polarized voting in North Carolina as a whole. Dr. Block did not so much as consider whether African Americans would be unable to elect their candidates of choice in CD1 unless the district was transformed into a majority-BVAP district. *See, e.g.*, *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 438-39 (S.D.N.Y.) (rejecting an "analysis [that] examines racially polarized voting without addressing the specifics of the third *Gingles* factor, which requires white majority bloc voting that usually defeats the [minority]-preferred candidate") (emphasis omitted), *aff'd*, 543 U.S. 997 (2004). Indeed, Dr. Block's report contains only one data point specific to CD1, which directly contradicts Appellants' position. *See* JA 896 (noting that more than 59% of whites voted for Congressman Butterfield, the black candidate of choice).[13]

---

[13] *See Cano v. Davis*, 211 F. Supp. 2d 1208, 1236-37 (C.D. Cal. 2002) (third *Gingles* prong not established where more than 50% of whites voted for Latino candidates in some races, and Latino candidates won in other districts with less than 50% of the white vote), *aff'd*, 537 U.S. 1100 (2003); *Page v. Bartels*, 144 F. Supp. 2d 346, 365 (D.N.J. 2001) (rejecting Section 2 claim under third *Gingles* prong where more than half of voters would vote for the candidate preferred by African-American voters); *Quilter v. Voinovich*, No. 5:91-CV-2219, 1992 WL 677145, at *4 (N.D. Ohio Mar. 19, 1992) ("[T]he white crossover vote for black legislative candidates was very substantial, usually more than 50%. Such voting is not legally significant racial bloc voting; rather, it is

Next, Appellants discuss Dr. Thomas Brunell's analysis, which similarly provides a generalized assessment of the degree to which black voters supported black candidates in North Carolina counties. *See generally* JA 971-1002, 1961-68. Like Dr. Block, Dr. Brunell conducted no analysis of whether whites could (or ever had) voted as a bloc to defeat the minority candidate of choice in CD1. *See id.* Dr. Brunell's report thus could not and does not provide a "strong basis" for concluding that the third *Gingles* factor was established as to CD1.

It is for this reason that the Panel, upon considering this evidence, found it wanting. *See* J.S. App. 49a-50a. As the Panel explained, the "generalized" Block and Brunell reports (1) did not relate specifically to CD1 and (2) did not demonstrate that a white majority usually voted as a bloc to defeat African Americans' candidates of choice. *Id.* Indeed, a separate three-judge district court examined the same reports proffered by Appellants and rejected them on the same basis. *See Covington v. N. Carolina*, No. 1:15-CV-399, 2016 WL 4257351, at *49 (M.D.N.C. Aug. 11, 2016) ("[W]hile both reports conclude that there is evidence of racially polarized voting in North Carolina, neither report 'speak[s]—one way or the other—to the effects of racially polarized voting,' i.e., to how racial polarization is affecting election outcomes in any geographic area.") (quoting *Rodriguez*, 308 F. Supp. 2d at 438).

---

coalitional voting, and this coalition of black and white voters is the target of the Board's plan. The [VRA] was not designed to serve the purpose of preventing coalitional black and white voting.") (footnotes omitted).

In relying upon the Block and Brunell reports, Appellants ignore entirely the only evidence available to the General Assembly that directly addressed the third *Gingles* factor: actual electoral outcomes. In 2011, the General Assembly had prepared and placed on its website all of the congressional election results by race and winning percentage from 1992 to 2010. *See* JA 367-80. Those results, demonstrating that African-American-preferred candidates had won handily every single election in CD1 even without a majority BVAP, plainly revealed that the third *Gingles* factor could not be established for CD1. Nothing in the Block or Brunell reports even touches upon the third *Gingles* factor, let alone refutes the unequivocal electoral evidence. *See Covington*, 2016 WL 4257351, at *52 ("Defendants knew they were increasing the BVAP in districts where African-American candidates . . . were already consistently winning under the Benchmark Plans. We can only conclude that such information was irrelevant to them when it came to determining the existence of *Gingles*' third precondition and applying their 50%-plus-one rule.").

Third, Appellants baldly assert that the General Assembly heard public testimony that "all . . . corroborated the expert reports" and that "a good deal" of this testimony "was specific to CD1." Br. 54. Appellants advanced a similar argument in their jurisdictional statement, citing to 20 exhibits from the trial in this case. *See* J.S. 15 (citing D-36 through D-56). In response, Appellees noted that—in fact—CD1 was mentioned only once in those exhibits, with a witness informing the General Assembly: "'[A]s it related to [the] First Congressional District . . . I don't want to see the packing going on' so as to 'create another minority district, but lessen' the opportunity

for minority candidates of choice to be elected in surrounding districts." Motion to Affirm 26 (quoting D-54 (Tr. 42:11-20)).

Appellants do not make the same mistake here. Instead, they make a different one.[14] In support of their "lay testimony" argument, they do not cite to primary evidence. Rather, they cite to state court findings of fact purporting to summarize portions of the State's preclearance submission "dealing with public input" for the *Senate* Plan—not the Congressional Plan at issue here. *See* JA 2066 n.39. In so doing, they avoid noting that, for example, they are relying on a citizen's testimony about two state legislative districts, and that this citizen "warn[ed] [the General Assembly] against packing of more blacks into our majority-minority [legislative] districts than are necessary to meet Voting Rights requirements." *Compare* JA 2066 *with* D-48 (Tr. 14:1-15:15).

Next, Appellants argue that Congressman Butterfield's trial testimony is the "best source" of evidence regarding whether the General Assembly had a strong basis in evidence for using race to draw CD1. Br. 55. This is a non sequitur. The General Assembly could not have had a strong basis in evidence for using race as the predominant factor to draw CD1 in 2011 based on Congressman Butterfield's trial testimony in 2015. In any event, if Appellants

---

[14] Indeed, Appellants' jurisdictional statement cited to four other pieces of "evidence" in support of their narrow tailoring argument, J.S. 15-17, all of which proved to either have no bearing on the existence or extent of racially polarized voting in CD1 or directly contradict Appellants' position, *see* Motion to Affirm 27-28. While Appellants appropriately omit those references here, their post hoc struggle to piece together a consistent—let alone compelling—defense is telling.

believe that Congressman Butterfield's opinions regarding the voting patterns of CD1 are near-dispositive, then it is telling that they ignore his testimony that the General Assembly was *not justified* in redrawing CD1 as a majority-BVAP district:

> [A]ny time you have a district that's already 47 percent African-American, and continuously, for more than a decade, has elected a candidate who is the choice of the African-American community, to then scoop up additional communities of African-American voters, and to add those voters to the existing majority minority district, is – meets the definition, in my view, of "packing." It's putting too many into a community in order to achieve a result.

JA 2428. Congressman Butterfield further testified that the General Assembly's use of "an unofficial number, such as greater than 50 percent" was inappropriate, that African-American candidates of choice had a fair opportunity at election in a district drawn at 47% BVAP, and that, indeed, the General Assembly could have reduced somewhat the BVAP of CD1 without impacting the ability of African-American-preferred candidates to "compete fairly." JA 2441-42.

Viewed with the utmost charity, all Appellants' evidence suggests is that the General Assembly was aware that there is some measure of racially polarized voting in the State of North Carolina as a whole and in at least some communities in northeastern North Carolina. That probably sounds familiar: It is the record from *Shaw II*. *See Shaw II*, 517 U.S. at 916-17 (finding "singularly unpersuasive" the State's contention that "once a legislature has a strong basis in

evidence for concluding that a § 2 violation exists in the State, it may draw a majority-minority district anywhere, even if the district is in no way coincident with the compact *Gingles* district, as long as racially polarized voting exists where the district is ultimately drawn"). The State's justification is no more compelling twenty years later. The General Assembly did not have a "strong basis" in evidence for its asserted belief that it had to greatly increase the BVAP of a district that has long elected minority candidates of choice to avoid Section 2 liability.

Appellants next complain that the Panel supposedly held in error that (a) benchmark CD1 was a "white majority" district and (b) that states cannot constitutionally create "new" majority-minority districts. Br. 56-57. This both misreads the Panel's decision and turns that decision on its head.

As to the former point, the Panel did not make a factual determination that the benchmark CD1 was white majority. Rather, in the context of explaining why the State could not possibly have believed that the third prong of the *Gingles* test was established, the Panel noted that Appellants had not adduced any evidence that a white majority could vote or had voted routinely as a bloc to defeat African Americans' candidates of choice in CD1—the record was starkly to the contrary. *See* J.S. App. 49a-51a. Because CD1 had not been a majority-BVAP district, the African-American candidate of choice was being elected by landslide margins on the strength of crossover voting. Appellants' failure to demonstrate that "the white majority votes sufficiently as a bloc . . . usually to defeat the minority's preferred candidate," *Gingles*, 478 U.S. at 51, dooms their narrow tailoring argument, as it demonstrates that any Section 2 claim

would necessarily fail. Appellants' objection to the term "white majority," meanwhile, reflects their dispute with the plain language of *Gingles*, not the Panel opinion below.

Appellants' second complaint—premised on the assertion that the Panel inappropriately focused on "past election results" (Br. 57)—also misses the mark. Consideration of "past election results" is the well-established means by which courts assess whether the third *Gingles* precondition is met. *See, e.g.*, *Gingles*, 478 U.S. at 56 ("[T]he question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices. . . . And, in general, a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting.").[15]

---

[15] *See also, e.g.*, *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 304 (D. Mass. 2004) ("Although the number of elections that must be studied [to determine whether the third *Gingles* factor is satisfied] will vary from case to case, the Supreme Court has cautioned that a pattern of polarized voting extending over a period of time is customarily more probative than the results of any single election.") (citing *Gingles*, 478 U.S. at 57 & n.25); *Uno v. City of Holyoke*, 72 F.3d 973, 984 (1st Cir. 1995) ("[T]he question whether a given electoral district experiences racially polarized voting to a legally significant extent demands a series of discrete inquiries not only into election results but also into minority and white voting practices over time."); *Valladolid v. City of Nat'l City*, 976 F.2d 1293, 1297 (9th Cir. 1992) (third *Gingles* factor not met where past election results "suggest[ed] that minority-preferred candidates usually won"); *Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1209 (5th Cir. 1989) (racial bloc voting is established through evidence of endogenous and exogenous election results).

Obviously, then, "to have a strong basis in evidence for the third *Gingles* precondition, a legislature must give consideration to the actual and potential *effect* of bloc voting on electoral outcomes." *Covington*, 2016 WL 4257351, at *47 ("[A]ssessing whether 'the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate,' [requires] at a minimum [considering] a representative cross-section of elections.") (quoting *Lewis v. Alamance Cty.*, 99 F.3d 600, 608 (4th Cir. 1996)); *see also Quilter v. Voinovich*, 981 F. Supp. 1032, 1061 (N.D. Ohio 1997) ("Given the overwhelming evidence of coalitional voting in the challenged districts under the existing plan and given the fact that the Defendants had this information available to them before they adopted the 1992 plan, the Defendants could not reasonably conclude that the relevant minority group could establish a *prima facie* case of a violation of section 2 of the Voting Rights Act in the four relevant districts."), *aff'd*, 523 U.S. 1043 (1998).

The fact that the North Carolina General Assembly had no strong basis in evidence to conclude that the VRA compelled it to transform CD1 into a majority-BVAP district does not mean that a State can never draw a majority-minority district. It means that North Carolina failed to meet its burden here. "Strict scrutiny remains . . . strict." *Vera*, 517 U.S. at 978.

In short, the record amply supports the Panel's conclusion that the State failed to meet its strict scrutiny burden.

C. *Strickland* Does Not Inoculate the Race-Based Redistricting of CD1

Appellants seek refuge in *Strickland* to justify the State's decision to draw CD1 as a majority-minority district without a "strong basis in evidence" for doing so. *See* Br. 49-50. Indeed, the record indicates the plan architects held fast to *Strickland* as the sole basis for increasing the BVAP of CD1 above 50%. When asked whether the conclusion that CD1 "needed to be raised" above 50% BVAP was based on any analysis, Representative Lewis responded: "[T]he most recent court case, in 2009, . . . Bartlett versus Strickland, I believe, defined that a majority of minority districts meant 50 plus one. It seems intuitive to me that majority-minority means that there are a majority of minorities." JA 619. Noting that CD1 had been drawn as a majority-black district twenty years earlier to comply with Section 2, the architects announced that *Strickland* "now obligated" the State to "re-establish" CD1 "as a true majority black district." JA 355-56; *see also* JA 474 ("[I]n light of the decision in *Bartlett v. Strickland*, . . . districts drawn with the intent of precluding a finding of liability against the State under Section 2 of the [VRA] must be drawn with a [BVAP] of at least 50% plus one.").

According to the General Assembly and Appellants, then, *Strickland* not only relieves the State from performing any analysis whatsoever of racial voting patterns when it draws majority-minority districts, it compels the State to "re-establish" majority-minority districts originally drawn in service of Section 2 regardless of current conditions. *See* Br. 50 (*Strickland* "require[s]" the legislature to draw majority-minority districts to comply with Section 2 of the VRA); *see also Covington*, 2016 WL 4257351, at *53 (taking State

defendants "at their word" that "the 50%-plus-one rule was applied to create majority-black districts . . . 'whenever possible'") (citation omitted). Appellants' misreading of *Strickland* runs deep.

In *Strickland*, a plurality of the Court held that a Section 2 plaintiff cannot satisfy the first *Gingles* precondition unless he or she establishes that it is possible to draw a reasonably compact majority-minority district. 556 U.S. at 25. "That is, section 2 does not compel the creation of crossover districts wherever possible." J.S. App. 51a n.10. This is, to state the obvious, "a far cry from saying that states must create majority-BVAP districts wherever possible," *id.*, as Appellants argue here. To the contrary, the Court has repudiated that interpretation of the VRA. *See generally Miller*, 515 U.S. 900 (rejecting the DOJ's then-existent "maximization" policy); *see also Strickland*, 556 U.S. at 16 ("[R]eading § 2 to define dilution as any failure to maximize tends to obscure the very object of the statute and to run counter to its textually stated purpose.") (citation omitted).

Strickland does not, as Appellants would have it, establish some kind of "safe harbor" that allows legislatures to evade constitutional scrutiny in racial gerrymandering claims. Nothing in the plurality decision in *Strickland* even suggests that the Court intended to silently overrule *Miller*'s unequivocal holding that the VRA does not require a state to pursue a "maximization" policy. And nothing in *Strickland* suggests that it dispenses with the third *Gingles* factor such that a state can use VRA compliance as a defense to a racial gerrymandering claim merely upon showing that it is possible to draw a majority-minority district.

In fact, *Strickland* cautions *against* the creation of majority-minority districts where minority candidates of choice have been elected with crossover support, as has long been the case in CD1.

> Our holding . . . should not be interpreted to entrench majority-minority districts by statutory command, for that, too, could pose constitutional concerns. See *Miller v. Johnson, supra*; *Shaw v. Reno, supra*. . . . Majority-minority districts are only required if all three *Gingles* factors are met and if § 2 applies based on a totality of the circumstances. In areas with substantial crossover voting it is unlikely that the plaintiffs would be able to establish the third *Gingles* precondition—bloc voting by majority voters. In those areas majority-minority districts would not be required in the first place[.]

Strickland, 556 U.S. at 23-24 (citation omitted). Thus, a proper reading of *Strickland* would have seen it as a warning that unnecessarily redrawing CD1 as a majority-minority district would violate the Court's racial gerrymandering jurisprudence, not as an invitation (let alone a command) to draw a majority-minority district simply because it was possible (albeit at the expense of traditional districting criteria). To the extent the State had any concerns about potential Section 2 claims, moreover, *Strickland* explains that "[s]tates can—and in proper cases should—defend against alleged § 2 violations by pointing to crossover voting patterns and to effective crossover districts."

Id. at 24.[16] Accordingly, not only does Appellants' purported evidence of racially polarized voting in CD1 fall flat, *see supra* 39-43, the State's failure to so much as consider the actual electoral history of this crossover district directly contradicts the case they contend compelled the creation of CD1 as a majority-minority district.

Because it misinterpreted *Strickland* in drawing the congressional map in 2011, the State turned the VRA on its head, transforming it into what amounts to a tool for perpetuating electoral racial segregation. The words of the *Strickland* Court apply with full force here:

> It would be an irony . . . if § 2 were interpreted to entrench racial differences by expanding a "statute meant to hasten the waning of racism in American politics." Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The [VRA] was passed to foster this cooperation.

556 U.S. at 25 (citation omitted). Far from "foster[ing] this cooperation," the State's race-based redistricting of CD1 ignored the electoral success of minority-preferred candidates and thwarted the goals of the VRA. This approach is hardly narrowly tailored to a compelling interest in VRA compliance.

IV. APPELLEES' CLAIMS ARE NOT BARRED

Finally, seeking to avoid the merits altogether, Appellants argue that Appellees' claims are barred by collateral estoppel and thus the Panel lacked

---

[16] To be sure, the State can claim no compelling interest "in avoiding meritless lawsuits." *Shaw II*, 517 U.S. at 908 n.4.

authority to even reach the merits of Appellants' claims. That Appellants did not even bother to include this contention as a "question presented" for the Court's consideration (Br. i) is perhaps all that need be said in response.

Indeed, what Appellants fail to mention is that the Panel considered and denied Appellants' motion for summary judgment on these grounds more than a year before trial. *See* Dkts. 74, 85. Appellants argued that Appellees were "members" of the North Carolina Conference of Branches of the NAACP ("NC NAACP")—one of the many plaintiffs in the state court litigation—and were "bound" by the trial court's judgment. *See* Dkt. 74 at 12. In opposition, Appellees stated that although they supported the mission of organizations dedicated to the advancement of African Americans' rights, and had to that end made small financial contributions over the years to the *national* NAACP (in Mr. Harris' case) and Mecklenburg County NAACP (in Ms. Bowser's case), they were *not* members of the NC NAACP and, regardless, collateral estoppel did not apply. *See generally* Dkt. 78. The Panel denied Appellants' motion given that, "with respect to [Appellants'] affirmative defenses, there are factual disputes and unresolved state law legal issues which preclude summary judgment." Dkt. 85 at 3.

Thereafter, Appellants abandoned their collateral estoppel argument altogether. They failed to even mention "estoppel" at trial, let alone present any evidence in support of that affirmative defense. This is why the Panel's order is silent on Appellants' newly-resuscitated estoppel argument.

Thus, Appellants are asking the Court to review the Panel's *interlocutory* denial of their summary judgment motion. This is improper as they have not

preserved the issue for appeal. *Ortiz v. Jordan*, 562 U.S. 180, 183-84 (2011) ("May a party . . . appeal an order denying summary judgment after a full trial on the merits? Our answer is no. . . . Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary-judgment motion.").

Even if it had been preserved, Appellants' collateral estoppel argument is specious, as suggested by the fact they cannot muster any record citations to support it. Appellees were not parties to the state court litigation, did not authorize any party to that case to act on their behalf, and, indeed, were not even aware a state court case existed at the time they filed this lawsuit. *See generally* Dkt. 78. Moreover, the state court plaintiffs are not plaintiffs in this case and have no ability to control this matter. *See id.* at 2. Appellants do not contend otherwise.

Nonetheless, Appellants claim that Appellees are estopped because they "concede that they are members of the plaintiff organization" in the state court litigation. Br. 20 (citing nothing). No, they did not. Both Appellees testified that they do *not* believe that they are members of the NC NAACP. *See* Dkt. 78 at 3-4.

Perhaps even more fundamentally, Appellants' claim that Appellees are bound as "members" of the NC NAACP rests on a broad theory of "virtual representation" that this Court has *expressly rejected*. *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008); *see also Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) (noting that the Court "unanimously" rejected the theory of "virtual representation" in *Taylor*). And even if that theory were viable, it would not apply here. Stripped to its essence, Appellants' argument is that Appellees

are bound to the results of a lawsuit they did not authorize, control, or even know about because Appellees are "black citizens seeking equal voting rights and that the NAACP exists in part to secure equal voting rights for blacks." *NAACP v. Fordice*, No. 95-60293, 1995 WL 767432, at *3 (5th Cir. Dec. 23, 1996). That is, to put it mildly, "not sufficient." *Id.*[17]

Appellants also assert that, even if collateral estoppel does not apply in this case, "[a]t a bare minimum, the district court should have granted some measure of deference to the directly on-point findings of the state court." Br. 22. Appellants cite no authority supporting this estoppel-by-a-different-name proposition and for good reason. None exists.[18]

---

[17] *See also Coors Brewing Co. v. Méndez-Torres*, 562 F.3d 3, 21 (1st Cir. 2009), *abrogated on other grounds by Levin v. Commerce Energy, Inc.*, 560 U.S. 413 (2010) (brewer was not bound by earlier judgment against trade association, absent evidence it "either controlled the litigation strategy of the association or duly approved the [association] to represent its interests" in litigation); *Pérez-Guzmán v. Gracia*, 346 F.3d 229, 236 (1st Cir. 2003) (party member not bound by judgment against party absent evidence that he controlled prior litigation or that the party "in the institution of this action, were engaged in tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple") (citation omitted); *Hoffman v. Sec'y of State of Maine*, 574 F. Supp. 2d 179, 187-88 (D. Me. 2008) (persons nominating candidate were not in privity with candidate nor bound by adverse judgment against candidate); *Griffin v. Burns*, 570 F.2d 1065, 1072 (1st Cir. 1978) (candidate was not in privity with voters, as his efforts to advance voters' interest were not "enough to make him their actual personal representative whose action or non-action in the state proceeding would legally bind them").

[18] Appellants' argument is a convenient litigation position, not a matter of principle. At the same time they offer a paean to federalism and comity, they outright ignore any state court

Indeed, this argument runs afoul of the "principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor*, 553 U.S. at 884 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). "The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Id.* at 892-93 (quoting *Richards v. Jefferson Cty.*, 517 U.S. 793, 798 (1996)). In fact, the Court has repeatedly rejected litigants' attempts to bind nonparties to judgments where claim preclusion does not apply premised on the same "policy concerns" Appellants proffer here. *See, e.g.*, *Smith*, 564 U.S. at 316-17 (argument that "serial relitigation" would ensue unless nonparties were bound to prior order denying certification of a putative class "flies in the face of the rule against nonparty preclusion").

In the absence of collateral estoppel, there is simply no reason why the Panel could or should have given "deference" to state court findings. The Panel was exercising its own original jurisdiction. In our federal system of government, it is no surprise that the state and federal courts may consider cases raising some of the same issues. Accordingly, "[t]his Court has repeatedly held that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction.'"

---

findings they find disagreeable, most notably the fact that CD1 was drawn with race as the predominant factor. *Compare* Br. 44 (Panel's conclusion that race predominated in CD1 "was error"), *with* JA 1984-85 (determining collectively that 26 "VRA districts," including CD1, were subject to strict scrutiny).

Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 292 (2005) (quoting *McClellan v. Carland*, 217 U.S. 268, 282 (1910)); *see also Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 588 (2013) ("In the main, federal courts are obliged to decide cases within the scope of federal jurisdiction. . . . [F]ederal courts ordinarily should entertain and resolve on the merits an action within the scope of a jurisdictional grant, and should not 'refus[e] to decide a case in deference to the States.'") (quoting *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 368 (1989)).[19]

That is particularly true here, where the state court litigation remains pending, has not been finally resolved, and primarily concerns a challenge brought on state statutory and constitutional grounds to 27 state legislative districts, in addition to CDs 1, 4, and 12. *See* JA 1984.[20]

---

[19] If Congress had wanted to require federal courts to give deference to the factual findings of state courts in certain cases, such as in the voting rights context, it could have expressly done so. *See e.g.*, *Williams v. Taylor*, 529 U.S. 362, 386 (2000) (recognizing, in the habeas corpus context, that by passing the Antiterrorism and Effective Death Penalty Act, Congress "plainly sought to ensure a level of 'deference to the determinations of state courts,' provided those determinations did not conflict with federal law or apply federal law in an unreasonable way") (quoting H.R. Conf. Rep. No. 104–518, at 111 (1996)). It has not done so here.

[20] The trial court's decision barely addresses CDs 1 and 12, eschewing individualized analysis for cursory and collective analysis of districts en masse. Thus, whereas Appellants tout the state court's "74-page opinion" and "171-page appendix," Br. 14, they fail to note that (a) the 74-page opinion contains no findings specific to CD1, instead conducting a unitary narrow tailoring analysis of 26 "VRA districts" collectively (JA 1986-2018); (b) CD12 is addressed collectively with three other districts in four

CONCLUSION

Appellees respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

KEVIN J. HAMILTON
WILLIAM B. STAFFORD
ABHA KHANNA
PERKINS COIE LLP
1201 Third Avenue
Suite 4900
Seattle, WA 98101-3099
(206) 359-8000

EDWIN M. SPEAS, JR.
CAROLINE P. MACKIE
POYNER SPRUILL LLP
301 Fayetteville Street
Suite 1900
Raleigh, NC 27601
(919) 783-6400

MARC E. ELIAS
Counsel of Record
JOHN M. DEVANEY
BRUCE V. SPIVA
PERKINS COIE LLP
700 Thirteenth Street, N.W.
Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com

October 12, 2016

---

pages with no separate analysis of CD12 (JA 2020-23); and (c) as to the "171-page appendix," only a handful of pages addresses either CD1 or CD12.